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# A Kinder, Gentler System or Capitulations? International Law, Structural Adjustment Policies, and the Standard of Liberal, Globalized Civilization

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# A Kinder, Gentler System of Capitulations? International Law, Structural Adjustment Policies, and the Standard of Liberal, Globalized Civilization

DAVID P. FIDLER<sup>†</sup>

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## I. INTRODUCTION

Structural adjustment policies (SAPs) used by the World Bank and International Monetary Fund (IMF) have been controversial for a number of years. Critical scrutiny of SAPs has increased in recent years as they have proliferated in Latin America and Africa as a common World Bank and IMF strategy to propel developing countries into the globalization era. Opposition to the use of SAPs has grown, and global civil society groups have even launched their own global crusade to “stand up” to SAPs.<sup>1</sup> Some randomly selected criticisms of SAPs indicate that opposition to them is passionate and widespread. Non-governmental participants at the 1995 International Women’s Conference in Beijing signed a declaration stating that “we declare war against all IMF-dictated Structural Adjustment Programmes (SAPs). These programmes have traumatised whole continents, torn apart the social fabric of entire societies and are wreaking havoc on the lives of billions of people worldwide, especially women.”<sup>2</sup> From Zimbabwe in 1998 came the following attack on SAPs: “For the last 8 years Zimbabwe has been implementing the World Bank and IMF Structural Adjustment policies or what they call in ‘polite and good language’ reforms. They have been a disaster for the workers, peasants and young people in Zimbabwe.”<sup>3</sup> An Ecuadoran civil society group argued in March 1999 that in Ecuador, “[a]fter 18 years of ‘stabilization and adjustment’ policies, the results continue to be catastrophic for the poor, and the failure of structural adjustment couldn’t be more evident.”<sup>4</sup>

While proponents and opponents of SAPs debate their importance for the future of the developing world, the literature on SAPs has drawn my attention as an international lawyer back in time rather than forward into the future. The discourse on SAPs reminded me of the controversies that existed in the nineteenth and early twentieth centuries about the system of capitulations maintained by powerful European countries and the United States in non-Western regions, such as the Ottoman Empire, Japan, and China.<sup>5</sup> At first, I brushed these comparisons aside, arguing that international society and international law have come too far for echoes of the capitulatory system to be heard in the dissonance caused by SAPs. But the essence of capitulations—powerful, capital-exporting countries imposing policies, rules, and institutions on weaker, non-European regions—continued to reappear as I thought more about SAPs and international law. Upon closer examination, I saw so many parallels that I began to see SAPs as the resurrection or reincarnation of political, economic, and legal thinking that created and maintained the system of capitulations in that earlier era. Such a reincarnation offers insights into the current condition and future direction of international law.

In Parts II and III of this article, I describe the parallel features of the old capitulatory system and the system of SAPs now being used by the World Bank and IMF. Underneath these parallel features flow deeper political, economic, legal, and moral currents that appear in both the context of capitulations and SAPs. In Part IV, I argue that SAPs are the capitulations of the era of globalization. In making this argument, I am not condemning

1. See Structural Adjustment Participatory Review International Network (SAPRIN), *Standing Up to Structural Adjustment* (visited Mar. 26, 1999) <<http://www.igc.apc.org/dgap/saprin/index.html>>.

2. *War on Structural Adjustment Programmes!* (visited Apr. 11, 2000), <<http://www.iww.org/~iw/nov/stories/women-imf.html>>.

3. John Munoru, *IMF and World Bank Policies*, AFR. PERS., Nov. 14, 1998, <<http://www.africanperspective.com/html10/imf.html>>.

4. SAPRIN-Ecuador, *Statement of the Local Civil-Society Steering Committee of the Structural Adjustment Participatory Review Initiative, SAPRI, on the Serious Situation in Ecuador*, Mar. 11, 1999 (visited Apr. 6, 2000), <<http://www.igc.apc.org>>. On Ecuador’s experience with SAPs, see also Frances Stewart & Albert Berry, *Globalization, Liberalization, and Inequality: Expectations and Experiences*, in *INEQUALITY, GLOBALIZATION, AND WORLD POLITICS* 150, 172 (Andrew Hurrell & Ngaire Woods eds., 1999).

5. For a description and discussion of the system of capitulations, see *infra* IIA.

either the system of capitulations or the use of SAPs; rather, I want to focus on the underlying forces that make SAPs reminiscent of capitulations and why this resemblance is important for contemporary international law.

Capitulations and SAPs are kindred in their fundamental message: to engage fully in international relations, your behavior has to conform to expectations, policies, and rules established by the prevailing powers. While the fundamental message appears to underscore the basic themes of realism as a theory of international relations, it also has consequences for international law. A very important consequence is that perceived changes in international law during the era of decolonization, such as the rejection of the "standard of civilization" as a driving force of international law, have been more apparent than real. In Part V, I argue that animating contemporary international law and relations is a new standard of civilization, what I call the standard of liberal, globalized civilization. This argument raises important and controversial questions about the function and future of international law in contemporary international relations, which are explored in Parts VI and VII.

## II. THE SYSTEM OF CAPITULATIONS IN THE NINETEENTH AND EARLY TWENTIETH CENTURIES

At the beginning of the twenty-first century, the era when the United States and European states imposed capitulations on non-European countries seems light years away. Most of today's international lawyers and international relations scholars were reared in their expertise during the era of decolonization, or in Hedley Bull's phrase, the developing world's "revolt against the West."<sup>6</sup> It is all too easy to forget, or as is the case with many students today, not even to know how basic and systematic the capitulatory regime was in the nineteenth and early twentieth centuries. An example drawn from international legal literature illustrates this point. One of the best known general treatises on international law, Ian Brownlie's *Principles of Public International Law*, deals with the system of capitulations in less than two sentences.<sup>7</sup> Compare this modern-day mention of capitulations with nineteenth century and early twentieth century international legal treatises, which deal extensively with the system of capitulations.<sup>8</sup> In this brief comparison, we sense a transformation in international law and politics from the end of the nineteenth to the end of the twentieth century.

Because the system of capitulations has faded back into the mists of time, this part briefly describes its fundamental aspects and its place in international law. I do not provide a comprehensive analysis of the capitulatory system because my purpose is only to describe its basic features as a prelude for analyzing SAPs.

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6. Hedley Bull, *The Revolt Against the West*, in *THE EXPANSION OF INTERNATIONAL SOCIETY* 217, 217 (Hedley Bull & Adam Watson eds., 1984).

7. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 525 (5th ed. 1998).

8. See, e.g., SIR SHERSTON BAKER, 1 *HALLECK'S INTERNATIONAL LAW* 386-400 (3d ed. 1893); THOMAS ALFRED WALKER, *THE SCIENCE OF INTERNATIONAL LAW* 230-32 (1893); T.J. LAWRENCE, *THE PRINCIPLES OF INTERNATIONAL LAW* 229-33 (1895); PASQUALE FIORE, *INTERNATIONAL LAW CODIFIED* 209-11, 362-63 (Edwin M. Borchard trans., 5th ed. 1918).

### A. Basic Description and Origins

Capitulations were a system of extraterritorial jurisdiction and power wielded by European states and the United States in the territories of non-Western countries. As *Halleck's International Law* stated:

[I]t was the object of the . . . treaties to exempt foreigners from the civil and criminal jurisdiction of the local magistrates and tribunals, and make them subject only to the laws and authorities of their own country, thus creating a kind of extra-territoriality for all citizens of the contracting States resident in or visiting any part of the East where the treaties obtained.<sup>9</sup>

Under capitulations granted, for example, by Siam to Britain, a British national in Siam could not be subject to Siamese criminal or civil jurisdiction.<sup>10</sup> In essence, foreign nationals living and working in these non-Western countries had immunity from local jurisdiction like diplomats and visiting heads of state. A Siamese national living or working in Britain did not, however, enjoy such immunity from British jurisdiction.

The origins of the capitulatory arrangements of the nineteenth century can be found as early as the late twelfth century. In 1193 the Sultan of the Ottoman Empire “extended extraterritorial jurisdiction to European ‘infidels’ who could not be expected to understand the religious codes which regulated the daily lives of the Sublime Porte’s other subjects.”<sup>11</sup> The first extraterritorial rights granted to Westerners in China likewise represented “special concessions unilaterally bestowed by a benevolent emperor upon a limited number of ‘barbarian’ traders, who otherwise would have been unable to function in an unfamiliar Chinese society.”<sup>12</sup> In this situation, capitulations originated in a non-Western ruler’s sense of superiority and power over Westerners living within his jurisdiction.<sup>13</sup> This origin would become ironic given how the system of capitulations developed between the late twelfth century and the end of the nineteenth century.

### B. Standard Features of a Capitulatory Regime

#### 1. Establishing the Conditions for Economic Interaction

While various motivations can be attached to the capitulatory regimes established in the nineteenth century, the primary intention was to establish some fundamental conditions for commercial interaction between the United States and European states on one side and non-Western countries and regions on the other.<sup>14</sup> Exempting Americans and Europeans from the application of civil and criminal law in non-Western countries would facilitate trade and economic intercourse because legal uncertainty and risk were removed for

9. BAKER, *supra* note 8, at 387–88.

10. See P.W. Thornely, *Extraterritoriality*, 7 BRIT. Y.B. INT’L L. 121, 130 (1926) (noting in the treaty between Siam and Britain “how completely all jurisdiction over British subjects and their property was transferred to the British consul”).

11. GERRIT W. GONG, *THE STANDARD OF ‘CIVILIZATION’ IN INTERNATIONAL SOCIETY* 107 (1984).

12. *Id.* at 65.

13. See Thornely, *supra* note 10, at 130 (“The old capitulation was a gracious grant by a powerful Sovereign to a group of humble petitioners.”).

14. See FIORE, *supra* note 8, at 362 (“The object of the Capitulations is to determine and to regulate the relations between civilized and uncivilized states, as regards the exercise of their respective sovereign rights with respect to the citizens of civilized states who reside in the countries where the Capitulations are in force.”).

American and European enterprises seeking to do business abroad.<sup>15</sup> Capitulations were a crude form of legal harmonization to facilitate the conduct of international trade and transactions in the early era of global commerce. As experts on international business transactions today argue, legal uncertainty and risk created by the diversity of legal systems among countries cause friction and inefficiency in doing cross-border transactions. A common answer to these problems is harmonization of domestic legal systems through international agreements.<sup>16</sup>

Capitulations in treaties also aimed at legal harmonization, but the method of achieving such harmonization was different. Rather than a harmonization based on mutual negotiation and compromise, American or European law was selected as the basis of harmonization and imposed on the weaker party. As Skinner Turner observed in 1929, what a Westerner wanted before giving up capitulations was "reasonable certainty as to the laws under which he is to come; some harmony between those laws and those of the western world."<sup>17</sup> The system of capitulations harmonized law in transactions between Westerners and non-Westerners, but it also put pressure on non-Western governments to reform their law along Western lines. A.M. Kotenev noted in 1925 how Chinese merchants successfully lobbied their government to modernize the Chinese legal system so they could compete with Western businessmen.<sup>18</sup> Capitulations thus served as a basis for legal harmonization during this period of history between Western and non-Western countries.<sup>19</sup>

It is important to note the limited nature of the harmonization created by capitulations. Capitulatory regimes did not make all legal claims as between foreigners and natives justiciable only before American or European consular courts. For example, under the 1858 treaty between the United States and Japan, the two countries agreed to open American consular courts to Japanese creditors of Americans and to open Japanese courts to American citizens with claims against Japanese nationals.<sup>20</sup> The different American and Japanese rules on breach of contract were not harmonized under capitulations, but Americans could not be subject to the compulsory jurisdiction of Japanese courts in connection with civil claims against them by Japanese nationals. Japanese nationals wanting to pursue claims against Americans had to learn the rules and procedures required under the American law applied by the consular court.

The pro-Western form of legal harmonization found in and stimulated by the capitulations acted as an incentive for American and European business people to exploit the markets opened up in non-Western regions, especially Asia. The exemption from compulsory civil and criminal jurisdiction eliminated legal risk and uncertainty in doing business with a number of countries, not just one or two. The various capitulation regimes made this exemption systemic in international economic relations between the United States and Europe and these new emerging markets for Western goods and investment. The systemic nature of the capitulatory regimes also supported use of consular courts as between nationals of the United States and European countries doing business in a non-

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15. See A.M. KOTENEV, *SHANGHAI: ITS MIXED COURT AND COUNCIL* xi (1925) (noting that "Europe and America tried to establish in China the same conditions for their trade as prevailed in their countries").

16. See, e.g., Paul B. Stephen, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743, 743-44 (1999). ("For more than a century, specialists in international and commercial law have gathered in various venues to promote convergence in those national laws that affect international commercial transactions. They have pursued, and in large part achieved, the promulgation of conventions and other legal instruments that states in turn have adopted to govern this commerce.").

17. Skinner Turner, *Extraterritoriality in China*, 10 BRIT. Y.B. INT'L L. 56, 63 (1929).

18. See KOTENEV, *supra* note 15, at xi.

19. Of course, outright conquest of non-Western countries and more intrusive forms of imperialism also acted as catalysts of legal harmonization on Western lines.

20. See BAKER, *supra* note 8, at 390.

Western country. So, in the words of *Halleck's International Law*, "an American in China may resort to the British courts there against an Englishman, or to French courts there against a Frenchman."<sup>21</sup> Thus, a Western businessman could be assured that any claims against him in a capitulatory state would be adjudicated according to the laws of his own country. Because American and European jurisprudence had similar roots, suing an Englishman in China under English law before what was essentially an English court was preferable to suing the same Englishman under Chinese law before a Chinese court. This benefit of the capitulatory system further decreased risk and uncertainty of conducting business in foreign lands.

## 2. Reflecting a Standard of "Civilization"

Of course, one might observe that a simpler harmonization model would have been, for example, to have all legal claims arising in China handled by Chinese courts under Chinese law. After all, a basic principle of international law recognized at the time was the principle that a state had jurisdiction over all matters within its territories, except in connection with ambassadors and diplomats.<sup>22</sup> Establishing conditions for economic intercourse took the form it did because capitulations reflected the Western concept of "civilization." Capitulatory regimes were established between the United States and European countries and countries designated either "unchristian" or "uncivilized." Crudely stated, the laws of unchristian or uncivilized countries could not be the basis for determining the rights and responsibilities of persons from Christian, civilized countries.<sup>23</sup> As Gerrit Gong observed, "[T]he standard of 'civilization' demanded that foreigners receive treatment consistent 'with the rule of law as understood in Western countries.'"<sup>24</sup>

The importance of the standard of civilization in the nature and dynamics of the capitulations reflects the collision of Western civilization and the non-Western civilizations that were forced to open to European and American commerce in the nineteenth century. As the international system became truly global in scope in the nineteenth century, finding ways to conduct political and economic relations between diverse cultures and societies became a critical issue. While this was not entirely a novel question, as European relations with the Ottoman Empire suggest,<sup>25</sup> the nineteenth century saw the expansion of the cultural diversity problem through the American and European penetrations into Asia and Africa. What prevailed legally in the United States and Europe—governmental guarantees of life, liberty, and property; freedom to travel, engage in commerce, and practice religion; protection of foreign nationals; and general observance of international law—became the

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21. *Id.* at 395.

22. *See, e.g., id.* at 209.

23. A glimpse of the civilizational prejudices behind this view can be found in a 1795 treatise on the law of nations, in which the author argues as follows:

If we look to the *Mahometan* and *Turkish* nations, . . . their ignorance and barbarity repels all examination . . . The same inferiority . . . is to be found even among the Chinese . . . Their wars have always been carried on with *Eastern* barbarity, and their known laws against strangers would alone demonstrate the point.

Among the *CHRISTIANS* on the other hand, every thing is conducted, or at least enjoined, by received and general laws, upon principles of the most extensive humanity and the most regular justice.

ROBERT WARD, II AN ENQUIRY INTO THE FOUNDATION AND HISTORY OF THE LAW OF NATIONS IN EUROPE FROM THE TIME OF THE GREEKS AND ROMANS TO THE AGE OF GROTIUS 3–4 (1795).

24. GONG, *supra* note 11, at 14.

25. *See FIORE, supra* note 8, at 362 (noting the capitulation granted in 1535 by Ottoman Sultan Suliman the Magnificent to Francis I of France).

standard of civilization against which non-Western countries were measured.<sup>26</sup> As Gong observed,

[T]he imposition of extra-territorial requirements until a certain “minimum of efficiency in running the State machinery, modicum of independence of the judiciary from the executive, and adequate protection of the safety, life, liberty, dignity, and property of foreigners” could be guaranteed by the non-European countries themselves, seemed a practical solution to the everyday problems which unavoidably arose when different civilizations collided in their customs and traditions.<sup>27</sup>

Many of the basic elements of a “civilized” legal system supported capitalism at home and abroad.<sup>28</sup> Under the influence of the standard of civilization, the conditions for economic intercourse established in capitulations were conditions that supported the kind of economic intercourse prevalent in Europe and the United States. Capitalism in both Europe and the United States rested on well-established legal systems that supported free enterprise. Capitulations represented the partial exportation of these legal systems to support commerce in the emerging markets of the uncivilized world.

The exportation was only partial because the United States and European countries did not require, for example, that Japan apply Western-style law and courts to commercial disputes between Japanese nationals. The partial exportation contained, however, a deeper implication: a country would not truly be civilized until it adopted and implemented legal reforms to create a Western-style legal system for all persons within its jurisdiction. This transformation process took place in Japan:

The transition from the ‘rule-by-status’ Tokugawa system of law to a Meiji ‘rule-by-law’ system has been described as a four-phase process: (1) the creation of a centralized administrative system, plus an auxiliary criminal law and court hierarchy; (2) the levelling of the old status hierarchy to a single *legal* (but not social) status . . . ; (3) the promulgation of a constitution to codify the developments in (1) and (2) above; and (4) the systematic enactment of an extensive body of code law for the private law field.<sup>29</sup>

Thus, the limited harmonization achieved by the capitulations would remain until the uncivilized country civilized itself along Western lines. International legal treatises of the capitulatory era stated this precondition clearly. Pasquale Fiore, for example, noted that “when the presupposed fact, lack of civilization, disappears in a given country, the Capitulations no longer have any *raison d’être*.”<sup>30</sup> The standard of civilization was itself a principle of legal harmonization on Western models of domestic and international law

26. See GONG, *supra* note 11, at 14–15 (providing a detailed analysis of the requirements of the standard of civilization).

27. *Id.* at 64.

28. See KOTENEV, *supra* note 15, at xi (noting that legal reforms made in Europe in the wake of the American and French Revolutions combined with revolutionary changes in the means of production “were able to ensure the enormous economical progress of the Occident”).

29. GONG, *supra* note 11, at 181. See also M.T.Z. Tyau, *Extraterritoriality in China and the Question of Its Abolition*, 2 BRIT. Y.B. INT’L L. 133, 139–40 (1921–22) (arguing that abolition of extraterritoriality in China was justified in part because of China’s progress in legal reform along Western lines).

30. FIORE, *supra* note 8, at 364. Fiore also added that capitulations should be terminated if an uncivilized country is annexed by a civilized state or becomes a protectorate of a civilized state. See *id.* at 211. See also WALKER, *supra* note 8, at 230 (“[T]hese immunities will no doubt disappear with the necessity for them, with the advance of Western civilisation into societies until lately non-progressive and stagnant.”).



providing justification for the capitulatory regimes. The standard of civilization as a principle of legal harmonization was more deeply a principle of civilizational harmonization because political, economic, and social changes necessarily followed legal reform.

### 3. Supported by International Law

A third important feature of capitulations is that they were supported by international law. Capitulations were negotiated into many treaties, and the standard of civilization supporting the capitulations was thought to constitute part of general international law.<sup>31</sup> International law thus became a critical conduit for establishing the conditions of economic and social interaction between Western and non-Western peoples along the lines prescribed by the Western standard of civilization. International law was a tool of the legal harmonization found in capitulations and of the more profound civilizational harmonization required by the standard of civilization.

As a matter of international law, capitulations represented an exception to the normal rules of international law. As noted above, general international law in the nineteenth century recognized that a state had jurisdiction over all persons and transactions that occurred within its territories. In addition, international law recognized the sovereign equality of states: "all sovereign States, without respect to their power, are, in the eye of international law, equal, being endowed with the same natural rights, bound by the same duties, and subject to the same obligations."<sup>32</sup> International law also recognized states could not interfere in the internal matters of other states.<sup>33</sup> Under international law, states had the right to establish their own political and civil institutions without interference from other states, even if other states organized their internal affairs differently.<sup>34</sup> Sovereignty also endowed a state with the exclusive right under international law to enjoy legislative and judicial independence from other states.<sup>35</sup> All these rules were considered fundamental principles of international law in the nineteenth century.

Capitulations required making exceptions to each of these fundamental principles of international law.<sup>36</sup> The creation and implementation of capitulatory regimes meant that non-Western countries (1) did not have jurisdiction over all persons and transactions occurring within their territories; (2) were subject to interference from the United States and European states in connection with the organization and operation of their internal institutions; and (3) did not enjoy legislative and judicial independence within their own territories. More generally, capitulations meant that non-Western countries subject to them were not equal in the eyes of international law because international law justified capitulations through treaty law and customary international law on the basis of the standard of civilization.

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31. See Elihu Root, *The Basis of Protection to Citizens Residing Abroad*, in ELIHU ROOT: ADDRESSES ON INTERNATIONAL SUBJECTS 43, 48 (Robert Bacon & James Brown Scott eds., 1916) (arguing in 1910 that "[t]here is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world"); GONG, *supra* note 11, at 14 (quoting Georg Schwarzenberger as claiming the standard of civilization had "crystallised into a rule of international customary law" from the mid-nineteenth century); *id.* at 54–93 (analyzing the relationship between the standard of civilization and international law).

32. BAKER, *supra* note 8, at 116.

33. See *id.* at 94.

34. See *id.*

35. See *id.* at 105.

36. See, e.g., LAWRENCE, *supra* note 8, at 229 (noting that an "exception from ordinary rules with regard to territorial jurisdiction occurs in the case of *Subjects of Western states resident in Eastern countries*").

The exceptions required from fundamental international legal principles to make capitulations work signaled that uncivilized countries were not full members of the international society of states. As Antony Anghie wrote, in the nineteenth century:

[P]ositivist international law distinguished between civilized states and non-civilized states and asserted further that international law applied only to the sovereign states that composed the civilized 'Family of Nations' . . . . Jurists . . . postulated a gap, understood principally in terms of cultural differences, between the civilized European and uncivilized non-European world. Having established this gap they then proceed to devise a series of techniques for bridging this gap—of civilizing the uncivilized.<sup>37</sup>

The standard of civilization created doctrinal conundrums for international lawyers in the nineteenth and early twentieth centuries. If only civilized countries were full members of the international society of states, then, as Gong asks, "how could treaty relations with these 'backward,' non-European countries be made consistent with the fact that such relations might be construed as recognition of legal personality?"<sup>38</sup> Ian Brownlie noted that prior to the late eighteenth and nineteenth centuries, Western states "had not clearly formulated a test of 'civilization'" to apply in dealings with non-Western countries.<sup>39</sup> For example, British treaty practice between 1750 and 1850 was pragmatic and not wedded to determining which non-Western nations were civilized.<sup>40</sup> The development of the standard of civilization as a key feature of international law emerged in the nineteenth century as Western states began to penetrate more extensively into Asia and Africa.<sup>41</sup> The pragmatism of the earlier era combined with the new importance of the standard of civilization to produce an increasing number of treaties containing capitulations. While international lawyers in the second half of the nineteenth century provided various ways to justify doctrinally the conclusion of treaties with uncivilized nations,<sup>42</sup> much of the activity producing capitulations was motivated more by commercial interests than by international legal theory. European states and the United States used treaties with capitulations to grease the commercial wheels of the expanding international system.

The same conundrum appears in connection with customary international law. In the nineteenth century, customary international law was "founded on the tacit or implied consent of nations as deduced from the intercourse with each other."<sup>43</sup> To discover rules of custom, "we must inquire whether it has been approved or disapproved by civilised nations generally, or at least by the particular nations which are affected in any way by the act."<sup>44</sup> Seeing capitulations as part of international customary law meant that Western states breaking into new but uncivilized emerging markets expected as a matter of international law to get capitulations from the non-Western government. Such an expectation is revealed in the comments of the American diplomat who negotiated the 1844 treaty between the

37. Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L. 1, 4-5 (1999).

38. GONG, *supra* note 11, at 60.

39. Ian Brownlie, *The Expansion of International Society: The Consequences for the Law of Nations*, in THE EXPANSION OF INTERNATIONAL SOCIETY, *supra* note 6, at 357, 358.

40. See *id.* at 359-61. See also GONG, *supra* note 11, at 64-65 (noting pre-nineteenth century treaties between European and non-European countries that "reflected a spirit of reciprocity and equality").

41. See generally GONG, *supra* note 11, at 24-53 (analyzing historical emergence of the standard of civilization).

42. See *id.* at 60-63 (analyzing various attempts by international lawyers to provide doctrinal explanations for treaty relations with uncivilized nations).

43. BAKER, *supra* note 8, at 51.

44. *Id.*

United States and China that American, British, and Portuguese precedents in the Middle East and Asia provided the legal basis for American demands for capitulations from China.<sup>45</sup> If the legal requirements contained within the standard of civilization applied to non-Western countries, then those countries had to be subjects of international law. Doctrinally, the circle could be squared if capitulations in treaties are seen as reflecting requirements mandated by customary international law. Uncivilized states were subjects of international law but lacked the internal capacity to fulfill some of the rules and standards found in customary international law.<sup>46</sup> Capitulations were required until the standard of civilization could be met by the uncivilized nations. Legal harmonization was, thus, required from non-Western countries by international law through treaty and custom.

The standard of civilization thus dramatically informed the application of international law. Indeed, the standard of civilization seen in operation in capitulations manifested a more profound challenge to fundamental international legal principles than the mechanical workings of capitulatory regimes. To graduate into the realm of civilized states would require far-reaching changes to political, legal, judicial, and civil institutions in non-Western countries. To claim the full rights of a sovereign state under international law, non-Western countries had to endure deep interference in their internal affairs by capitulatory regimes specifically and the standard of Western civilization more broadly.

The grounding of capitulations in international law is also important because one of the requirements imposed by the standard of civilization was adherence to international law.<sup>47</sup> To be considered civilized, a non-Western country had to allow Western states to dictate aspects of its internal sovereignty in order for it to conform to international law, both in fulfilling capitulatory treaties and the demands of customary international law. Ironically, in order for non-Western countries subject to capitulations to benefit from the international legal principles of sovereign equality and non-interference, they had to admit the inferiority of their cultures and permit massive interference with their internal affairs.

#### 4. Multilateral Process

Another important feature of the capitulatory system was that it was multilateral in nature. Capitulations were not just ad hoc arrangements between a few Western and non-Western countries. Rather, capitulations became central to the international relations between many Western and non-Western nations in the nineteenth century. The grounding of capitulations in international custom illustrates the extent to which the practice was widespread and systematic among Western states. Capitulations were a multilateral process central to the emerging dynamics of international relations between Western and non-Western countries. Such multilateralism meant, of course, that countries such as Japan and China bore multiple encroachments on their sovereignty as most Western countries engaging in relations with them demanded capitulations. The effect of this multilateralism

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45. See *id.* at 391.

46. See, e.g., FIORE, *supra* note 8, at 100–01.

International law should be applied to every state, without regard to its political constitution and religious faith . . . . At the present day, no state of Africa, Asia or other parts of the world is excluded from the legal community . . . . A state which, owing to lack of civilizational or traditional prejudices based upon religion, customs, political institutions, or other cause, is actually on able to guarantee the respect and observance of international law, cannot demand its application with perfect equality so long as it is not internally so organized as to be . . . on the same footing with other states.

*Id.*

47. See GONG, *supra* note 11, at 15.

was to expose non-Western countries to intensive economic relations with Western countries. In connection with the Ottoman Empire, Thomas Naff observed that “the continued success of the capitulatory states in extracting and exploiting the new commercial and political privileges resulted in transforming the Ottoman Empire into a virtual open and free market for Europe . . . . A few decades into the nineteenth century, the Empire’s economic subjugation to Europe was well-nigh complete.”<sup>48</sup> Capitulatory multilateralism helped transform international trade and commerce into truly global phenomena.

## 5. Exercise of Hegemonic Power

The system of capitulations reflected the exercise of hegemonic power in the international system by Western states. The magnanimous origins of capitulations in the Ottoman Empire in the late twelfth century gradually disappeared as Western states increasingly imposed capitulations on weaker, non-Western states. By the nineteenth century, what had changed since the late twelfth century was not Western notions of cultural superiority, but rather the power to embed a standard of civilization into international law and international relations.<sup>49</sup> The exercise of hegemonic power was often far from subtle, as capitulations were often imposed through the use or threat of force.<sup>50</sup> Non-Western states found themselves facing Western military firepower and mobility that they could not hope to oppose successfully through traditional customs and practices. This military superiority acted as a catalyst for the exposure of non-Western countries to Western political, economic, and legal hegemony.<sup>51</sup> Capitulations thus reflected all the armaments of Western hegemony in the nineteenth century.

## 6. Impact of Capitulations

Capitulations had a different impact on different non-Western countries. While Japan managed to graduate into the realms of the civilized nations by the end of the nineteenth century, capitulations lingered for several more decades in the Ottoman Empire and China. The capitulatory regime provided motivation for Japanese leaders to transform Japanese politics, law, and society to meet the standard of civilization established by the West. In addition, the Japanese proved skilled in implementing political, legal, and social imports from Western countries.<sup>52</sup> Neither China nor the Ottoman Empire proved as adept as Japan in becoming “civilized.” In those countries, the capitulations adversely affected not only diplomacy but also internal politics. In China, the continued existence of capitulations fueled nationalistic sentiment in all political factions.<sup>53</sup> While the Ottoman Empire became increasingly integrated into the European system of states, the capitulations contributed to

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48. Thomas Naff, *The Ottoman Empire and the European States System*, in *THE EXPANSION OF INTERNATIONAL SOCIETY*, *supra* note 6, at 143, 158.

49. See GONG, *supra* note 11, at 65–66.

50. See, e.g., *id.* at 143 (noting how the British-Chinese treaties of Nanking (1842) and Tientsin (1858) were “[d]ictated under threats of naval bombardment and overland siege”); *id.* at 171 (noting how “Western readiness to employ superior firepower against defenceless coastal towns” motivated the Japanese leadership to come to terms with Western demands).

51. See generally Michael Howard, *The Military Factor in European Expansion*, in *THE EXPANSION OF INTERNATIONAL SOCIETY*, *supra* note 6, at 33, 33–42.

52. See GONG, *supra* note 11, at 164–200 (analyzing Japan’s entry into the international society).

53. See *id.* at 161. See also *id.* at 130–63 (analyzing China’s entry into international society).

the harmonization “of *systems* and the material and technological accoutrements of modern societies” but did not produce a cultural harmonization.<sup>54</sup>

Despite the disparate individual experiences of non-Western countries with capitulations, this system contained a more profound kind of impact on the world. Capitulations represented important mechanics in the growth of international society from a European to a universal scope. Through capitulations and other interactions, Western countries forced non-Western countries into diplomatic and economic intercourse along Western lines, effectively imposing on the planet a framework of sovereign states interacting politically and economically on the basis of international law. Capitulations reflected a lack of capacity on the part of non-Western countries to engage in this form of political and economic interaction. As Hedley Bull observed, “[S]ocieties did in fact differ radically in their capacity to conduct the new forms of international relations, and the tests devised by the Europeans recognized that this was so.”<sup>55</sup>

While the tests devised by Western states were self-serving and full of cultural and racial prejudice, they also reflected the increasing complexity and sophistication of international relations in the nineteenth century. The nineteenth century witnessed many new developments in international relations, such as advances in regulation of diplomacy, communications and transport, international law, and organization of the global economy.<sup>56</sup> As Bull argued, “[I]t was the Europeans (and Americans) who were at the forefront of all these developments, and the capacity of Asian and African powers to enter into relationships on a reciprocal basis with European states of the same nature that the latter had with one another was less than in earlier times.”<sup>57</sup> Capitulations were blunt instruments of capacity-building for non-Western countries, unprepared for the brave new world of the universal international society.

### III. STRUCTURAL ADJUSTMENT POLICIES IN INTERNATIONAL RELATIONS

SAPs have been used by international financial organizations in some form since the 1970s. In the 1990s, this instrument of global economic management has been under severe attack, particularly from non-government organizations (NGOs) working in developing countries implementing SAPs. In this section, I briefly provide an overview of SAPs and then delineate their standard features. As this analysis unfolds, the reader will see the parallels between SAPs and capitulations. While SAPs are obviously not identical to capitulations in detail or in political context, the similarities are striking and perhaps unsettling for those who believed the world represented by capitulations was now a historical curiosity.

#### A. *Basic Description and Origins of Structural Adjustment Policies*

SAPs are strategies through which the World Bank and the IMF provide financial assistance, usually in the form of loans, to developing countries suffering severe economic problems. The World Bank and the IMF condition the receipt of the financial assistance on the developing country engaging in structural adjustment of its economic and fiscal policies. The financial assistance combined with the structural adjustments are designed to prepare the developing country for encouraging economic development and engaging

54. Naff, *supra* note 48, at 169.

55. Hedley Bull, *The Emergence of a Universal International Society*, in *THE EXPANSION OF INTERNATIONAL SOCIETY*, *supra* note 6, at 117, 125.

56. *See id.* at 117–26.

57. *Id.* at 125.

effectively in the global economy. As Aderanti Adepoju stated, a SAP's "principal objective is to realign overall domestic expenditure and production patterns in order to bring the economies back to a path of steady and balanced growth."<sup>58</sup> SAPs focus on domestic changes needed to build a foundation for successful exports, less restricted imports, and attraction of foreign investment, all in an effort to engage developing country economies' with the global market.<sup>59</sup> The economic model behind SAPs is the liberal or neoliberal theory of economic growth and development.<sup>60</sup>

While variants of SAPs can be found in some World Bank and IMF activities in the 1970s, SAPs really became central features of World Bank and IMF work in the 1980s when debt crisis hit many developing countries.<sup>61</sup> To prevent countries from declaring bankruptcy, the World Bank and the IMF provided fresh financial assistance conditioned on the understanding of major economic and fiscal reforms. Since the debt crisis of the 1980s, SAPs have become one of the key strategies of the World Bank and the IMF in providing assistance first to the developing world and then to the transition economies of the former Soviet bloc.<sup>62</sup> Because the World Bank and the IMF have applied SAPs to all regions in the developing world, they represent a global strategy for the World Bank and the IMF. As the ongoing controversy about SAPs demonstrates, this global strategy is not fading away in connection with how the World Bank and the IMF deal with developing countries.

## B. *Standard Features of a Structural Adjustment Policy*

### 1. *Establishing the Conditions for Economic Interaction*

As noted above, the strategic objective of SAPs is to transform developing countries' economies so that they can achieve growth through successful participation in the international economy. More simply, SAPs aim to establish some fundamental conditions for economic interaction between the developed and developing worlds. The policy, institutional, and legal changes mandated by SAPs seek to facilitate trade and investment between developed and developing countries, and between developing countries by reducing political, economic, and legal uncertainty and risk for private enterprise. Because much of what is required under a SAP involves legal changes, SAPs can be seen as a sophisticated form of legal harmonization to facilitate the conduct of global trade and investment. As with capitulations, this harmonization is imposed on the developing world country by country, slowly building up a systemic harmonization in international relations. Rather than a harmonization based on mutual negotiation and compromise, Western forms

58. Aderanti Adepoju, *Introduction to THE IMPACT OF STRUCTURAL ADJUSTMENT ON THE POPULATION OF AFRICA 1*, 3 (Aderanti Adepoju ed., 1993).

59. See Michael Redclift & Colin Sage, *Resources, Environmental Degradation, and Inequality, in INEQUALITY, GLOBALIZATION, AND WORLD POLITICS*, *supra* note 4, at 122, 130 (arguing that SAPs "reorient most developing economies away from domestic concerns with employment generation and poverty alleviation and towards the needs of the world market and the dictates of market prices").

60. See Stewart & Berry, *supra* note 4, at 151 (arguing that World Bank and IMF policies move developing countries "away from state intervention in trade, industrial, and social policies towards a laissez-faire market; from 'dirigisme' . . . to 'liberalism'").

61. See Caroline Thomas, *Poverty, Development, and Hunger, in THE GLOBALIZATION OF WORLD POLITICS* 449, 455 (John Baylis & Steve Smith eds., 1997) (noting the use of SAPs in the developing world following the debt crisis of the early 1980s).

62. See Ngaire Woods, *Order, Globalization, and Inequality in World Politics, in INEQUALITY, GLOBALIZATION, AND WORLD POLITICS*, *supra* note 4, at 8, 23–24 ("[I]n the 1980s 'structural adjustment' was urged on developing countries the world over, and in the 1990s a similar set of liberalizing policies were urged on the former Eastern bloc countries—the so-called 'transition economies.'").

of economic policy and law have been selected as the basis of harmonization and imposed on the developing countries through SAPs.<sup>63</sup>

While SAPs do not carve out extraterritorial rights for Westerners in developing countries, the pro-Western form of legal harmonization found in SAPs is designed to act as an incentive for Western companies to tap into markets in the developing world. While capitulations were limited forms of legal harmonization, SAPs are more ambitious because they restructure many macroeconomic policies and the laws and institutions that support those new policies. Instead of select pockets of extraterritoriality, SAPs require far-reaching, horizontal, and vertical political, economic, and legal changes in a developing country. These changes are aimed at building a foundation for successful engagement by the developing country with the global economy. Thus, the goal of SAPs is to create conditions under which a Western business trading or investing in a developing country never, to paraphrase Edmund Burke, feels itself quite abroad.<sup>64</sup>

## 2. Reflecting a Standard of "Globalization"

Establishing the conditions for economic intercourse takes the form it does through SAPs because they reflect the dominance of liberal or neoliberal economic thinking. In other words, SAPs reflect a standard of "globalization" created by developed, Western countries. The World Bank and the IMF use SAPs in developing countries because these countries are deemed not to possess the internal makeup needed to engage in the global economy successfully. Rather than being "uncivilized," these developing countries are "unglobalized." Crudely stated, the policies, laws, and institutions of unglobalized countries cannot be the basis for attracting trade and investment from the developed world and for participation in the global market. SAPs contain a standard of globalization that demands that developing countries implement policy, legal, and institutional reforms consistent with those believed successful by the developed world.

While the historical contexts of the standards of civilization and globalization are dramatically different, the substance of the two standards is not. In essence, the standard of civilization required the creation and maintenance of certain conditions that would allow Westerners to conduct commerce and trade safely and effectively in non-Western countries. SAPs are based on a set of political, economic, and legal requirements to support sustainable interaction between developing countries and developed countries. As Phillip Alston noted, the World Bank's work with developing countries "emphasizes privatization, decentralization, the strengthening of civil society, the eradication of corruption, increasing the efficiency and professionalism of a radically downsized bureaucracy, and promotion of the rule of law which is defined in effect as a legal system in which foreign investors can have trust."<sup>65</sup> The standards of civilization and globalization thus share the central objective of improving the conditions of economic interaction between the West and the rest.

The standard of globalization more specifically includes many of the key elements of the standard of civilization, namely respect for the commercial interests and property of foreigners, the need for stable and efficient governmental institutions, maintenance of

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63. See text accompanying notes 58, 59, and 61.

64. See Edmund Burke, *First Letter on a Regicide Peace* (1776), in *EMPIRE AND COMMUNITY: EDMUND BURKE'S WRITINGS AND SPEECHES ON INTERNATIONAL RELATIONS* 287, 315–16 (David P. Fidler & Jennifer M. Welsh eds., 1999) [hereinafter *EMPIRE AND COMMUNITY*].

65. Philip Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 3 *EUR. J. INT'L L.* 435, 443 (1997).

effective and transparent laws and independent courts to administer them, and adherence to international law. Perhaps most striking is the common emphasis in both standards on the "rule of law." Capitulations involved the extraterritorial application of Western law in non-Western countries, and SAPs involve requirements to adopt Western-style legal systems. Or, as Serge Sur bluntly characterized it, "The Rule of Law . . . means the extra-territorial application of American law by any and all means."<sup>66</sup> Just as the standard of civilization supported the incorporation of non-Western countries into the Western international society of states, the standard of globalization supports bringing developing countries into the Western, globalized international society of today.

Further, the origins of the standards of civilization and globalization are identical. The standard of civilization "reflected the norms of liberal European civilization,"<sup>67</sup> and the standard of globalization reflects the norms of the same civilization now expanded beyond the confines of Europe and North America. Criticisms that globalization is nothing more than the Americanization of the world<sup>68</sup> attest to the link between liberalism and the standard of globalization.<sup>69</sup>

In positing the existence of a standard of globalization, I am not equating it with everything that takes place in the phenomenon of globalization. European states and the United States engaged in many acts during the nineteenth and early twentieth centuries at home and abroad that did not accord with their own standard of civilization. The potential for similar hypocrisy exists in connection with the standard of globalization. The more important point is that globalization is not, as some argue, a value-neutral phenomenon in international relations.<sup>70</sup> The standard of globalization, like its precursor the standard of civilization, comes out of a very particularly philosophical and cultural perspective that shapes the direction of the processes of globalization.

The importance of the standard of globalization found in SAPs reflects the economic gap between developed and developing countries in the era of globalization. This economic gap is the product partly of past imperialism, culture, and partly of the legacy of socialistic economic policies adopted widely in the developing world from the 1960s through the 1980s. The debt crisis in the developing world in the 1980s, combined with the capitalistic success of certain developing economies in East Asia, spelled the beginning of the end of whatever appeal central-planning theories of economic development had in developing countries. As technological and political changes ushered in the era of globalization in the late 1980s and 1990s, finding ways to improve political and economic relations between the developed and developing world became a central issue. Under SAPs, what prevails economically and legally in the developed world, principally in the United States and Europe, became the standard of globalization against which developing countries are measured.

Many of the basic elements of a globalized legal system support capitalism at home and abroad. Under the influence of the standard of globalization, the conditions for economic intercourse established in SAPs are conditions designed to support the kind of economic activity and intercourse prevalent in developed countries. Capitalism in developed countries rests on well-established political, economic, and legal institutions and

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66. Serge Sur, *The State Between Fragmentation and Globalization*, 3 EUR. J. INT'L L. 421, 431 (1997).

67. GONG, *supra* note 11, at 15.

68. See, e.g., Sur, *supra* note 66, at 429 (arguing that globalization is "a convenient term to indicate American hegemony").

69. See Stewart & Berry, *supra* note 4, at 151 (arguing that "conceptually and empirically it is impossible to differentiate globalization and liberalization completely").

70. See Alston, *supra* note 65, at 442 (noting that the majority of commentators see globalization as devoid of particular content or values).



systems that support free enterprise nationally and internationally. Much like capitulations, SAPs represent the exportation of these liberal systems to the developing world to support trade and investment between developed and developing countries.

The exportation under SAPs in many respects penetrates developing countries now more than capitulations did non-Western countries in the nineteenth century. While capitulations technically applied only to legal relationships between natives and foreigners and between foreigners, the legal reforms contained in SAPs apply across the entire society and economy of a developing country. Capitulations produced pressure for more wide-ranging legal reforms, but SAPs engage in systemic reform as their primary objective. Nevertheless, SAPs echo capitulations in the deeper implication of both these phenomena—a non-Western/developing country would not be truly civilized/globalized until it adopted and implemented economic and legal reforms to create a Western-style economic and legal system for all persons within its jurisdiction. Thus, SAPs will remain a strategic instrument of the World Bank and IMF until the unglobalized country globalizes itself along American/European lines. In other words, the standard of globalization is itself a principle of economic and legal harmonization on Western models of economics and law, providing justification for the use of SAPs.

### 3. Supported by International Law

Like capitulations, SAPs are supported by international law. SAPs are agreements concluded between sovereign states and international organizations, both of which are subjects of international law. In addition, international law provides the foundation and framework for the World Bank and the IMF through their respective charters. Unlike capitulations, which were imposed by one state against another, SAPs flow from the multilateral process created by the treaties establishing and governing the functioning of these international financial organizations. This multilateralism lends SAPs political and legal legitimacy that unilateral state actions would not have today. Thus, international law is important for establishing the conditions of economic interaction between developed and developing countries along the lines prescribed by the American/European standard of globalization.

As with capitulations, one could argue that SAPs represent infringements on basic principles of international law—the sovereign equality of states and the principle of non-interference with internal affairs. The strategic aim of SAPs is to radically transform the internal affairs of a developing country. Many developing countries have to face SAPs because they are poor and weak, and thus are not treated as equals in international relations. One might respond that developing states voluntarily enter SAP agreements, making such agreements acts of sovereignty, not stigma of inequality or exclusion from international society. But, the same argument could be used in connection with capitulations—China entered into treaties, expressions of its sovereign will under international law, that granted capitulations voluntarily. In reality, SAP agreements are no more voluntary today than capitulations were in yesteryear. The pressure or duress applied in the context of SAPs does not come from naval vessels offshore poised to attack, but from the grinding disciplines of economic globalization and the financial power wielded by the World Bank and the IMF.

Like the relationship between capitulations and international law, the relationship between SAPs and international law signals that unglobalized countries are not full members of the international society of states or the global society of states and non-state actors. The standard of globalization informs the application of international law in the

global era. Indeed, the standard of globalization found in the use of SAPs manifests a more profound challenge to fundamental international legal principles than the mechanical workings of SAPs. To graduate to the realm of globalized states requires far-reaching changes to political, economic, legal, judicial, and civil institutions in developing countries. To claim the effective rights of a sovereign state under international law in the global era, developing countries have to endure deep interference into their internal affairs by SAPs specifically and the standard of globalization more broadly.

The relationship between SAPs and international law is also important because one of the requirements imposed by the standard of globalization is, as with the standard of civilization, adherence to international law. It is widely recognized that globalization creates many opportunities and problems for states that can only be exploited and handled through cooperative arrangements solidified through international law. Adherence to international law thus becomes important in being a globalized state. In the global era, adherence to international law goes beyond obedience to traditional rules, such as diplomatic immunity, to include adherence to rules of international law that require domestic capabilities, such as in the areas of human rights and environmental protection.<sup>71</sup> This requirement for domestic capabilities to adhere to international law was present as well in the standard of civilization. Gong noted that Western states expected non-Western states to maintain published legal codes and independent judiciaries before they could be considered civilized.<sup>72</sup> SAPs specifically aim to encourage the establishment of economic and legal capabilities within developing countries that will help them adhere to international law, such as in connection with the treatment of imported goods and foreign capital investments. But, just as with capitulations, to move into the position to adhere more effectively to international law, a developing country has to allow developed states to dictate through the World Bank and the IMF aspects of its internal sovereignty. To be considered a globalized state, a developing country subject to a SAP has to admit the inadequacy of its government and society and permit massive interference with its internal affairs, which seemingly cuts against the fundamental, international legal principles of sovereign equality and non-interference.

#### 4. Multilateral Process

Like capitulations, SAPs also reflect a multilateral process. As noted above, the World Bank and the IMF are multinational organizations. The power in these international organizations is, by and large, controlled by the same group of "civilized" powers that were responsible for the creation of the multilateral system of capitulations—the European countries and the United States. Thus, the demand for SAPs originates in a multilateral context. Similarly, applications of SAPs are also multilateral because SAPs have been and are being used all over the developing world. SAPs, like capitulations in an earlier age, have become part of the landscape of political and economic relations between developed and developing countries. While capitulations were required under customary international law, no one argues that SAPs are. However, they have been used so frequently in the developing world that they reflect a dynamic familiar from the nineteenth century. When the powers of the globalized world begin to deal with a developing country through the

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71. See, e.g., Gregory H. Fox, *Strengthening the State*, 7 IND. J. GLOBAL LEGAL STUD. 35, 35–36 (1999) (discussing how contemporary international law "require[s] States to alter law and practice in virtually every area of governance").

72. See GONG, *supra* note 11, at 18.

World Bank and the IMF, they routinely require SAPs and expect developing countries' cooperation in their creation and implementation.<sup>73</sup>

SAPs thus represent a multilateral process central to the dynamics of global relations between developed and developing countries. The effect of the multilateralism is to expose developing countries to more intensive economic relations with globalized countries and bring them squarely into the dynamics of the global economy. Just as capitulations drew non-Western countries into economic dependence on Western powers, critics of SAPs complain that SAPs are merely tools for further subjugating developing countries to the power of developed countries and their companies.<sup>74</sup> SAP multilateralism contributes to the shaping of the processes of the global economy in the image projected by the liberal standard of globalization.

## 5. Exercise of Hegemonic Power

The system of SAPs reflects the exercise of hegemonic power in the international system by globalized states. It is no coincidence that SAPs became systemic instruments during the period when Soviet influence and power declined and then disappeared. By the 1990s, what had changed since the era of decolonization was not American/European notions of political and economic superiority, but rather the opportunity to embed a standard of globalization into international law and international relations. Soviet power and ideology offered developing countries an alternative to the liberal model offered by the West, and the various movements in the developing world, such as the New International Economic Order of the 1970s, built off ideas antithetical to the capitalist powers.<sup>75</sup> The debt crisis in the developing world in the 1980s revealed the economic disaster that central planning, import substitution strategies, and hostility to foreign investment had produced. With Soviet power and influence beginning its decline during the same decade, the developing world had few options other than turning to the capitalist-minded World Bank, IMF, and developed countries. Development assistance from the World Bank and IMF also began to change in the 1980s from project-specific financing (e.g., to build a dam or power plant) to assistance dependent on policy and legal reform.<sup>76</sup> The 1980s were also the decade when developed states were beginning to sense the opportunities and challenges of globalization as new technological advances opened new economic vistas for those prepared for global markets.

While capitulations rested partly on American/European military superiority, the hegemonic power behind SAPs is more economic than military. Behind both the military superiority of the nineteenth century and the economic superiority of the late twentieth century is Western technological supremacy. Just as African tribes wielding traditional weapons could not contend in the longrun with European military technology and tactics,

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73. See, e.g., Thomas, *supra* note 61, at 455 (noting how "the IMF and World Bank pursued a vigorous policy of structural adjustment lending throughout the developing world"); Carol Welch & Jason Oringer, *In Focus: Structural Adjustment Programs*, 3(3) ECONOMIC JUSTICE NOW! (April 1998) (visited June 13, 2000), <[http://www.economicjustice.org/resources/media/inFocus\\_3\\_3.html](http://www.economicjustice.org/resources/media/inFocus_3_3.html)> ("Virtually all developing countries—particularly in Latin America and Africa, and increasingly in the transition countries of east and central Europe—have implemented or are in the process of acceding to SAPs.").

74. See, e.g., Welch & Oringer, *supra* note 73, ("The U.S. leverages its dominant role in the global economy and in IFIs [international financial institutions] to impose SAPs on developing countries and open their markets to competition from U.S. companies.").

75. See Thomas, *supra* note 61, at 456–57 (discussing critiques of the post-1945 liberal economic order, including the unsuccessful New International Economic Order).

76. See *id.* at 455 (noting how IMF and the World Bank began to use SAPs vigorously in the wake of the 1980s debt crisis in the developing world).

economies in developing countries in the global era cannot contend in the longrun with power and wealth that modern technologies, such as computers and other information technologies, provide globalized states. Such overwhelming technological superiority translates into political, economic, and legal hegemony for globalized states. SAPs reflect all the armaments of developed world hegemony in the late twentieth century.

## 6. Impact of Structural Adjustment Policies

While criticism of SAPs suggests that nothing good has resulted from their use, SAPs have had a different impact on different developing countries.<sup>77</sup> Just as Japan became "civilized" well before the Ottoman Empire or China expunged capitulations, developing countries have shown differing capacities to globalize themselves under SAPs. Much literature on SAPs tries to determine what explains the success or failure of SAPs in different countries.<sup>78</sup> On this question, proponents and opponents of SAPs differ dramatically. Proponents argue that SAP failure derives from political, economic, legal, and cultural factors under the control of the developing country in question.<sup>79</sup> Opponents of SAPs argue that their failure results from factors not under the control of a developing country, such as the biased structure of the international economic system.<sup>80</sup>

I do not intend to enter this important debate. What is more interesting than country-specific impact analysis of SAPs is the larger impact of SAPs on the world. Just as capitulations laid the groundwork for the universal extension of the Western system of states and conception of international law, SAPs help lay the groundwork for the universal extension of the processes of globalization for states and non-state actors. SAPs reflect a lack of capacity on the part of developing countries to engage effectively in many aspects of globalization. SAPs are economic and legal tests devised by the globalized states that reflect the unglobalized condition of most developing countries. SAPs are indicia of the attempt by globalized states to, in Garcia Clark's phrase, make the world safe for globalization.<sup>81</sup>

While the tests devised by globalized states are self-serving, they also reflect the increasing complexity and sophistication of international relations in the late twentieth century. The latter half of the twentieth century has witnessed many new developments in international relations, such as advances in computer technology, transport technology, new international legal regimes (e.g., human rights and environmental protection), and the growth in power and influence of non-state actors, such as multinational corporations and NGOs. The globalized states of Europe, North America, and Asia have been at the

77. See Stewart & Berry, *supra* note 4, at 154–55 ("[T]he effects of liberalization differ according to how the policy changes are undertaken. In particular, it is reasonable to expect variation according to how quickly the liberalization is carried out, the sequencing of the steps taken, and the policies adopted to facilitate the adjustments of firms and of groups of workers and families. Hence, liberalization produces a great variety of results.").

78. See, e.g., DAVID DOLLAR & JAKOB SVENSSON, WHAT EXPLAINS THE SUCCESS OR FAILURE OF STRUCTURAL ADJUSTMENT PROGRAMS?, (World Bank Policy Research Working Paper No. 1938, June 1998).

79. See, e.g., Woods, *supra* note 61, at 15 (noting that neo-liberals in the 1980s shifted the argument about the inequality between developed and developing countries from structural barriers to policy choices, which "removed inequality from the realm of international politics and cast it instead into that of economics and public administration").

80. See Thomas, *supra* note 61, at 457 (noting that developing countries in the 1980s perceived the international economic structure "as being inherently unfair and disadvantageous to their interests").

81. See generally Garcia Clark, *The Roots of Cultural Backlash in Contemporary Processes of Globalization*, 7 IND. J. GLOBAL LEG. STUD. 257 (1999) (originally entitled *Making the World Safe for Globalization*).

forefront of creating and benefiting from all these developments. The capacity of developing countries to enter into relationships with globalized states on a reciprocal basis is in many respects low and in others non-existent. SAPs are blunt instruments of capacity-building for developing countries unprepared for the brave new world of globalization.

#### IV. STRUCTURAL ADJUSTMENT POLICIES AS THE CAPITULATIONS OF THE ERA OF GLOBALIZATION

Analyzing the similarities between nineteenth century capitulations and twentieth century SAPs provides more than useful political, economic, and legal parallels. Answering whether SAPs are a blessing or a curse might be subordinate to understanding why SAPs (like capitulations) flow from the structure and dynamics of international relations. Reaching this understanding has interesting consequences for thinking about international law. Capitulations and SAPs represent historical hinges upon which international law and relations have swung and continue to swing into new, unknown eras.

At bottom, capitulations arose in the context of clashes between civilizations unequal in material and technological power. The international system of sovereign states, with its attendant system of international law, grew out of civilizational homogeneity in Europe. The standards for behavior were established without constant friction from cultural diversity. Interactions with non-European cultures occurred, but before the nineteenth century, these interactions involved outright conquest (e.g., North and South America), sporadic commercial contact (e.g., Asia and sub-Saharan Africa), or relationships not characterized by a great disequilibrium of power (e.g., the Ottoman Empire). Capitulations were designed to support systemic interaction between different civilizations more intense than the commercial contacts of the eighteenth century. In laying down the economic and legal dynamics for this systemic interaction, capitulations became sinews in the emerging universal international society. The Western standard of civilization prevailed in the clash of civilizations because the Western countries were the builders of the new international society and exercised their superior power to ensure that the society was built in their image.

SAPs reflect an unfolding dynamic that will determine in what direction the universal international society takes in the new millennium. Much of the post-World War II period represented a struggle between Western, socialist, and developing countries to determine the future of the international system and society. A key aspect of this period was the "revolt against the West" on the part of developing countries, often aided and abetted by socialist states. In international political, economic, and legal realms, developing states attempted to reshape international society more to their interests and aspirations. The competition between the superpowers proved useful in advancing their new political, economic, and legal agendas as the developing countries played the superpowers off against each other in the search for economic, military, and political assistance. There were new ideas put on the table and new opportunities to transform international organizations and international law to reflect more the interests and needs of the developing world. Important in the dynamics of this "revolt" was the decline in the power of the West as Soviet expansionism and decolonization challenged its previously enjoyed supremacy. The challenges mounted by developing countries to the prevailing system of international law produced "what in the 1960s was called 'the crisis of international law.'"<sup>82</sup> This period gave the impression that developing countries were finally gaining their rightful place as equal members of the international society before the eyes of a purged international law.

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82. GONG, *supra* note 11, at 90.

The parallels between capitulations and SAPs reveal that this impression has been an illusion. The attempt by developing countries in the era of decolonization to escape the inequality represented by the capitulations was incomplete and unsuccessful. The "backwardness" of many developing countries in the face of globalization is the contemporary equivalent of the "backwardness" of non-Western societies in their first contacts with surging European and American power. With the collapse of Soviet power and the disintegration of developing country unity, Western states again enjoy political, economic, and technological supremacy. As Samuel Huntington observed, "the West is now at an extraordinary peak of power in relation to other civilizations."<sup>83</sup> From the perspective of international law, what is important is that the West now holds such awesome civilizational power vis-à-vis the rest of the world. It holds almost exclusively in its hands the substance and direction of international law, as it once did in the late nineteenth and early twentieth centuries.

In this context, SAPs represent the capitulations of the era of globalization. Huntington observed that "[t]hrough the IMF and other international economic institutions, the West promotes its economic interests and imposes on other nations the economic policies it thinks appropriate."<sup>84</sup> In laying down the economic and legal dynamics for globalized interaction, SAPs are sinews in the emerging universal, globalized society. The Western standard of globalization is prevailing because the globalized countries are the builders of this new globalized world and are exercising their superior power to ensure that globalization is built in their image. As non-Western countries had to do in connection with capitulations, developing countries dealing with SAPs are faced with the task of assimilating their futures with the future being blazed by globalized states on land, by sea, in space, and through cyberspace.

From an international lawyer's perspective, this globalized process of homogenization à la SAPs taps into the much larger incorporation of the liberal norms in international law. Virtually all the major international legal developments of the twentieth century, such as the proliferation of international organizations, international human rights law, the development of international trade law, and international environmental law bear the imprimatur of liberal, developed states and liberal political thinking. SAPs are also kin of extensive "rule of law" and "good governance" efforts in developing countries and transition economies of the former Soviet empire.<sup>85</sup> Liberal hegemony in international legal thinking also appears in claims made by some international lawyers that international law now recognizes a human right to liberal democracy.<sup>86</sup> As Professor Gregory Fox argued, much of international law today seeks to strengthen the state by regulating more and more how states conduct their internal affairs.<sup>87</sup> The influence of liberal thinking can be seen in Fox's observation that "'good international citizens' are now primarily those states who elect their governments, permit civil societies to form, respect their citizens' human rights, repeal non-tariff barriers to the distribution of foreign goods, eradicate corruption, and maintain impartial judicial systems."<sup>88</sup>

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83. Samuel P. Huntington, *The Clash of Civilizations?*, 72 FOREIGN AFF. 22, 39 (1993).

84. *Id.*

85. See, e.g., Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95 (1998) (analyzing the growth in "rule of law" reform efforts in the post-Cold War world). See also WORLD BANK, GOVERNANCE: THE WORLD BANK'S EXPERIENCE (1994); INTERNATIONAL MONETARY FUND, GOOD GOVERNANCE: THE IMF'S ROLE (1997).

86. See, e.g., Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

87. See generally Fox, *supra* note 71 (describing developments in international law that parallel objectives of SAPs). See also Woods, *supra* note 62, at 17 (noting that "conditional lending today reflects an aspiration to 'strengthen and modernize' the state and its capacity to deliver").

88. See Gregory H. Fox, *Strengthening the State*, Presentation at the Symposium on Globalization from Developing States (Feb. 1999) (on file with the author).

Further supporting the liberal hegemony in contemporary international law has been the post-Cold War rejuvenation of interest among international relations scholars and international lawyers in liberal international relations theory.<sup>89</sup> The thrust of this new interest in liberalism and international law contains interesting echoes of the kind of thinking that produced the capitulatory system. Benedict Kingsbury wrote:

Emerging liberal thinking about the international legal order argues increasingly that it is possible to divide the world into zones, with a liberal zone of law, constituted by liberal states practising a higher degree of legal civilization, to which other states will be admitted only when they meet the requisite standards. This is in some respects a continuation of recurrent patterns in the history of Western legal thought, traceable, for example, in the sixteenth-century European divisions between Christians and infidels, or in James Lorimer's late-nineteenth-century division of the world into a hierarchy of civilized nations, barbarous humanity, and savage humanity.<sup>90</sup>

SAPs are thus just one of a number of prominent phenomena that indicate that a liberal standard of globalization powerfully influences how international law is created and applied.

## V. THE STANDARD OF LIBERAL, GLOBALIZED CIVILIZATION

Within this larger liberal hegemony in international law, we can detect the confluence of the standard of civilization from the nineteenth century and the standard of globalization from the late twentieth century. Benedict Kingsbury argued that dividing the world into liberal and non-liberal zones with "the liberal West as the vanguard of a transformed global legal order" involves a "new standard of civilization" designed "to promote the advancement of the backward."<sup>91</sup> This confluence of the standards of civilization and globalization combines basic liberal standards for the treatment of persons (nationals and foreigners) and property.<sup>92</sup> Protecting individual rights reflects respect for human dignity, and protecting property facilitates economic growth and international trade and investment. While SAPs do not deal directly with human rights protections, they do seek to establish harmonized standards for how developing states should deal with capital and property. The standard of globalization takes the harmonization of standards for treatment of property and capital well beyond what was seen in the standard of civilization. SAPs embody and push this standard of globalization, but so do the liberal framework and rules of international trade law found in the General Agreement on Tariffs and Trade and the World Trade Organization, international law on foreign investment, "rule of law" initiatives, and "good governance" policies. In addition, the confluence of the standards of civilization and globalization contains the powerful Western attachment to science and technology.<sup>93</sup> It was scientific and technological supremacy that provided the platform for the standard of civilization in the nineteenth and early twentieth centuries. Similarly, the standard of

89. See, e.g., Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367, 373 (1998) (noting that "liberal IR theory has reclaimed lost ground").

90. Benedict Kingsbury, *Sovereignty and Inequality*, in *INEQUALITY, GLOBALIZATION, AND WORLD POLITICS*, *supra* note 4, at 66, 90 [hereinafter *Sovereignty and Inequality*].

91. *Id.* at 90–91.

92. See GONG, *supra* note 11, at 91 (noting similarities between the old standard of civilization and the new standard of human rights).

93. See *id.* at 92 (noting a possible "standard of modernity" succeeding the standard of civilization that "vindicates the nineteenth century assumption that the laws of science being universal, undergirded a rational cosmology which would bring the 'blessings of civilization' to all").

globalization is informed by the revolutionary changes in information and computer technologies, which have greatly enhanced the power and influence of liberal states and Western non-state actors in international relations.

The confluence of the standards of civilization and globalization at the end of the twentieth century produces the composite *standard of liberal, globalized civilization*. The new standard of civilization includes the following principles: (1) respect for basic civil and political human rights; (2) respect for the importance of civil society in domestic and international politics; (3) commitment to democratic governance; (4) commitment to the "rule of law" domestically and internationally; (5) commitment to free market economics domestically and free trade and investment internationally; and (6) commitment to developing and applying science and technology to political, legal, economic, and social challenges. The imprint of liberalism is apparent because liberalism focuses on the freedom of the individual, democracy, the "rule of law," market economics, economic interdependence between nations, and the power of reason to improve human welfare through scientific advance.

Just as international law incorporated and was largely based on the standard of civilization in the nineteenth century, contemporary international law incorporates and is largely based on the standard of liberal, globalized civilization. The prominence of this standard can be seen in the emphasis in contemporary international law given to civil and political human rights, the role of NGOs, democratic governance, free trade and investment, and the protection of intellectual property rights for scientific and technological developments. Rather than the "revolt against the West" leading to permanent changes in international law and international relations, we seem to have gone back to the past where the standard of civilization in international law and relations lives on and reflects the norms of contemporary Western liberalism. Thus, it is a delusion to believe that the West has left behind the supposedly historically and intellectually discredited "standard of civilization" in connection with international law. This observation might support those critical of SAPs and what they represent, but perhaps it also supports re-evaluating the standard of civilization historically and theoretically in connection with international law and international relations. The resurrection of the standard at the end of the twentieth century raises the possibility that it serves a deeper structural and normative purpose than simply making the West richer and more powerful. As Georg Schwarzenberger argued, "The nexus between Civilisation and International Law is a basic question of International Law."<sup>94</sup>

The nineteenth century standard of civilization in international law grew out of cultural conflict created by the expansion of European international society. The standard represents the offspring of cultural dissonance in the international system. The role of culture in international relations is a much discussed contemporary topic in international law and relations.<sup>95</sup> Huntington argued that in the future, "[t]he clash of civilizations will dominate global politics."<sup>96</sup> International lawyers also face questions about international law and cultural diversity. A specific example is the controversy over cultural relativism and international human rights law. More generally, Kingsbury argued that "a persistent feature of international law, [is] the problem of reaching normative judgments in a

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94. Georg Schwarzenberger, *The Standard of Civilisation in International Law*, 8 CURRENT LEGAL PROBLEM 212, 212 (1955).

95. See, e.g., SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996); Simon Murden, *Cultural Conflict in International Relations: The West and Islam*, in *THE GLOBALIZATION OF WORLD POLITICS*, *supra* note 61, at 374.

96. Huntington, *supra* note 83, at 22.



heterogeneous world while simultaneously accommodating deep cultural, social and religious differences.”<sup>97</sup>

But the friction caused in international relations by cultural diversity is not a new issue. One of the most perceptive thinkers about culture in international relations was the eighteenth century thinker-statesman Edmund Burke.<sup>98</sup> For Burke, cultural similitude was the key force behind the law of nations and the foundation of international society. Burke argued:

In the intercourse between nations, we are apt to rely too much on the instrumental part. We lay too much weight upon the formality of treaties and compacts. We do not act much more wisely when we trust to the interests of men as guarantees of their engagements. The interests frequently tear to pieces the engagements; and the passions trample upon both. Entirely to trust either, is to disregard our own safety, or not to know mankind. Men are not tied to one another by papers and seals. They are led to associate by resemblances, by conformities, by sympathies. It is with nations as with individuals. Nothing is so strong a tie between nation and nation as correspondence in laws, customs, manners, and habits of life. They have more than the force of treaties in themselves. They are obligations written in the heart.<sup>99</sup>

This position is even more intriguing because Burke was not a civilizational chauvinist as were most of his contemporaries. In his attempts to protect India from rapacious British imperial practices, he argued that Indian civilization was morally equivalent to European civilization.<sup>100</sup> If Britain could not engage in commercial intercourse with India without destroying its civilization, then it had to abandon its activities in India.<sup>101</sup> At the same time, Burke did not believe that the law of nations governed relations between Britain and India because it was the “public law of Europe”—a culturally bound system of rules.<sup>102</sup> Between India and Britain there was little correspondence in laws, customs, manners, and habits of life. Without that cultural foundation, the law of nations would be merely “instrumental” and subject to the whims of nations and princes.

Interestingly, Burke never provided a detailed answer to how Britain and India could engage in extensive economic intercourse without some cultural harmonization on how trade, investment, and the people involved in such activities would be handled. This is, of course, the question to which capitulations developed as an answer in connection with the relations between Western and many non-Western countries. In capitulations, Western civilization was merely grafted onto the territory of non-Western civilizations. Capitulations, in combination with conquest and imperialism, set the terms for how international society would be harmonized as a matter of the mechanics of the international system. This harmonization did not, however, go too far beyond the mechanical aspects of

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97. Benedict Kingsbury, *Confronting Difference: The Puzzling Durability of Gentili's Combination of Pragmatic Pluralism and Normative Judgment*, 92 AM. J. INT'L L. 713, 713 (1998) [hereinafter *Confronting Difference*].

98. For a comprehensive analysis of Edmund Burke's thinking on international relations, see David P. Fidler & Jennifer M. Welsh, *Introduction to EMPIRE AND COMMUNITY*, *supra* note 62, at 1, 1–67.

99. *First Letter on a Regicide Peace*, *supra* note 64, at 315.

100. See Edmund Burke, *Speech on Opening of Impeachment (1788)*, in *EMPIRE AND COMMUNITY*, *supra* note 64, at 203, 227. Contrast Burke's views with those of Robert Ward. See WARD, *supra* note 22.

101. “[I]f we are not able to contrive some method of governing India well, which will not of necessity become the means of governing Great Britain ill, a ground is laid for their eternal separation; but none for sacrificing the people of that country to our constitution.” Edmund Burke, *Speech on Fox's India Bill (1783)*, in *EMPIRE AND COMMUNITY*, *supra* note 64, at 170, 171.

102. See Fidler & Welsh, *supra* note 98, at 44–45.

international relations as decolonization and the ideological struggle of the post-World War II era represented conflict over what heart and soul would prevail in the operation of the systemic machinery. SAPs in combination with the other features of liberal hegemony in international law and relations are setting the terms for how international and global society will be harmonized not only as a matter of globalized mechanics but also as a cultural and philosophical matter. SAPs are not civilization grafts but are components of an ongoing civilization transplantation being advanced partly through international law.<sup>103</sup>

## VI. INTERNATIONAL LAWYERS AND THE STANDARD OF LIBERAL, GLOBALIZED CIVILIZATION

Many international lawyers will react with discomfort to my assertion that the standard of civilization has been reincarnated in the standard of liberal, globalized civilization. For example, Kingsbury argued

[i]t is not clear . . . why human flourishing is better promoted by the construction of an identifiable 'other', an 'us' and 'them' from amongst the myriad ways of understanding and classifying the world . . . . The outcome seems likely to be the maintenance of a classificatory system which is itself both an explanation and a justification for those at the margins remaining there for generations.<sup>104</sup>

Highlighting the standard does, however, bring into focus some central issues about the nature and direction of international law in this culturally heterogeneous world. The first issue has to do with international lawyers' awareness of the value-laden nature of their work. Identifying the standard of liberal, globalized civilization accords with Kingsbury's observation that a "combination of universalism based on pragmatic pluralism and normative judgment based on a personal and culturally bounded set of morals and values is a striking feature of the practice and scholarship of international law."<sup>105</sup> In the post-Cold War period, these "culturally bounded set of morals and values" employed by international lawyers are overwhelmingly liberal.<sup>106</sup> The standard of liberal, globalized civilization finds expression in Francis Fukuyama's thesis that "[t]he ideological controversies of the past have given way to a general agreement on the basic values of human rights, democracy, and market economy."<sup>107</sup> Knowingly or not, international lawyers have been at the forefront of advancing this liberal consensus in the era of globalization.

The second issue is how international lawyers should approach cultural diversity. The standard of liberal, globalized civilization is the current dominant approach, and it may have proceeded far enough to render analysis of alternatives academic. Kingsbury argued that "[t]he positing of a set of definitive norms encompassing the globe but neutral as to

103. Numerous commentators have focused on the cultural problems created by Western-led globalization. See, e.g., Simon Murden, *Cultural Conflict in International Relations: The West and Islam*, in *THE GLOBALIZATION OF WORLD POLITICS*, *supra* note 61, at 377; THOMAS I. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION* (2000) ("The dilemma that emerged right across the world . . . was the extent to which engaging with the world market economy threatened existing patterns of culture and social order.").

104. *Sovereignty and Inequality*, *supra* note 90, at 91.

105. *Confronting Difference*, *supra* note 97, at 723.

106. Of course, this corresponds with the fact that most international legal scholarship originates and most international legal practitioners live in liberal, globalized states.

107. J.H.H. Weiler & Andreas L. Paulus, *The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?*, 8 EUR. J. INT'L L. 545, 564 (1997) (analyzing Francis Fukuyama's "end of history" thesis).

culture and detached from the particularities of the human agents who constitute and operate the international system is an attractive, but illusory, response.”<sup>108</sup> Another alternative approach is floated by J.H.H. Weiler and Andreas Paulus: “The more diverse civilizations, traditions, attitudes there are in the world, the stronger the claim for ‘second degree’ law, which does not purport to resolve deep value conflicts but to make coexistence of radically opposed value systems possible.”<sup>109</sup> This approach would utilize international law in merely mechanical ways to achieve coexistence and would support only a very shallow sense of international society. It harkens back to the mechanical, practical ways European states used international law in their relations with non-European countries before the nineteenth century.

Weiler and Paulus recognize the unattractiveness of the “coexistence” approach by arguing that “the more the future world comes to rely or depend for its material and spiritual future well-being on common values such as sustained development, human rights, free human and material exchange, the more the ‘world community’ will require a unitary, hierarchized international law.”<sup>110</sup> By definition, the members of an international society share common interests, values, rules, and institutions.<sup>111</sup> The function of the old standard of civilization was to provide the common political, economic, and legal foundation for the construction of an international society between diverse cultures. The function of the new standard of liberal, globalized civilization is the same; but it also functions to build the foundation for a global society of peoples as well through the transnationalization of civil society activities.

Through the standard of liberal, globalized civilization, international law plays a role in writing obligations on the hearts of governments and peoples in the globalized world. While critics of liberal hegemony in international law and relations may shudder at this thought, the process of civilizational harmonization is well under way and has been since the nineteenth century. International law and international lawyers are prominent instruments in this process. Capitulations and SAPs belong to the same phenomenon in the history of international relations. Civilizational harmonization is not needed to make an international system and its attendant international law operate. But it is needed in some form to produce international society and global society. If achieving some level of international and global society is thought important for human welfare, then civilizational harmonization in some form is necessary. As Gong argued, “some standard of civilization will remain a feature of international society wherein cultural diversity and pluralism exists coetaneously with hierarchy and anarchy.”<sup>112</sup>

## VII. CONCLUSION

Neither the standard of civilization nor the standard of liberal, globalized civilization were inevitable in the course of human events. To believe otherwise would be to fall victim to what Phillip Allott calls the “tyranny of the actual.”<sup>113</sup> At the same time, there is some tyranny in the actual in that the historical progress of the anarchical international system limits the room for alternative human and moral choice on the values to guide international and global society. Western states have implemented the standard of

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108. *Confronting Difference*, *supra* note 97, at 723.

109. Weiler & Paulus, *supra* note 107, at 565.

110. *Id.*

111. See HEDLEY BULL, *THE ANARCHICAL SOCIETY* 13 (1977) (stating that an international society “exists when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions”).

112. GONG, *supra* note 11, at 248.

113. Philip Allott, *The Concept of International Law*, 10 EUR. J. INT’L L. 31, 49 (1999).

civilization and the standard of liberal, globalized civilization because for various reasons (none of which were inevitable), they gained hegemony in their relations with non-Western peoples. The fruit of that hegemony—civilizational harmonization on Western terms—has been eaten, and the world is transformed in ways that cannot now be undone.

Indeed, even the many reflectivist and constructivist challenges to the liberal hegemony in international law and relations which are merely searches for different forms of Western-led civilizational harmonization. The fruit of Western hegemony in this sense has been a poisoned fruit and a return to the Garden of Eden a hopeless fantasy. Criticizing SAPs or mounting intellectual and political attacks on the standard of liberal, globalized civilization remains, at the end of the day, little more than a search for a kinder, gentler system of capitulations.

